Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC. AND NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

Of Counsel:

EVERETT H. ERLICK
ROBERT J. KAUFMAN
AMERICAN BROADCASTING COMPANIES, INC.
1330 Avenue of the Americas
New York, NY 10019

February 24, 1981

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Counsel for Petitioner American Broadcasting Companies, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

The Brief for Respondents fails to address meaningfully many of the central issues of this case. By premising their argument on the theory that Section 312(a)(7) creates a "new obligation" that "vests rights in individual candidates,"[1] Respondents disregard critical limitations built explicitly and implicitly into the statute. By

[1] Brief for Respondents (hereinafter "FCC Brief"), p. 14.

contending that Section 312(a)(7) represents a sharp departure in the relationship of candidates and broadcasters, Respondents overlook the fact that the decision below first erected the standards that now seriously threaten basic policies and reasoned decisionmaking. By claiming that the Commission's interpretation of Section 312(a)(7) benefits political expression, Respondents divert attention from the Commission's potentially wholesale intrusion into the partisan political process.

I. RESPONDENTS HAVE NOT DEMONSTRATED THAT SECTION 312(a)(7) AUTHORIZES THE RIGID REGULATORY SYSTEM ESTABLISHED BY THE DECISION BELOW

Respondents attempt to cast the decision below as being virtually compelled by the explicit language of Section 312(a)(7) and representing a natural outgrowth of preexisting legislative and regulatory policies. An examination of the pertinent language and the overall policy framework does not support this assessment. Rather, it shows a Congressional intention and a regulatory tradition that, while encouraging political discussion, nevertheless recognizes long-established concepts of reasonableness, licensee discretion, and evenhanded treatment of political candidates—principles that represent the very antithesis of a "vested" individualized right of candidate access.

A. The Plain Language Of Section 312(a)(7) Undermines, Rather Than Supports, The Decision Below

In the introduction to their brief, Respondents note that " 'the starting point in every case involving construction of a statute is the language itself,' " repeating this Court's admonition in *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 558 (1979). We agree, as our opening brief clearly indicates. ABC Brief, pp. 20-23.

We emphatically disagree, however, with the extended meaning Respondents now attempt to ascribe to that language.[2]

On its face, Section 312(a)(7) speaks in rather general and abbreviated terms, merely providing that the Commission may "revoke any station license" for:

> "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."[3]

Contrary to Respondents' emphasis on the Commission's authority to penalize broadcasters for failing to afford access in a highly individualized manner, the provision incorporates an unmistakable discretionary element—i.e., a standard of reasonableness. Indeed, the provision employs the concept reasonableness not once, but twice—referring both to "reasonable access" and to "reasonable amounts of time." If Congress had intended to depart from the long-established concept of permitting deference to reasonable broadcaster judgments, it surely would have chosen words less qualified and more specific. The new, highly individualized access right for federal candidates claimed by Respondents is simply not found in the statutory language.[4]

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[2] It is revealing—perhaps ironic—that while Respondents presently speak so convincingly of the plain and graphic nature of Section 312(a)(7)'s meaning (FCC Brief, pp. 19-23), at earlier stages and in other, less defensive circumstances, the Commission saw fit to conclude that the language of the statute and its legislative history did not provide very significant guidance. *See, e.g., Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1087 (1978).

[3] 47 U.S.C. § 312(a)(7).

[4] Similarly, Respondents fail to demonstrate that the phrase "*his* candidacy" is somehow axiomatic of a new individualized right. FCC Brief, p. 20. As we noted in our opening brief (ABC Brief,

As this Court has indicated, prior to the passage of Section 312(a)(7), Commission interpretive policy required broadcasters to make some time available to political candidates generally. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14 n.12; ABC Brief, pp. 21-22. In fact, this policy was what Congress "essentially codified" in Section 312(a)(7). *Id.* Thus, it is fair to conclude that Congress, by adding a specific penalty, was confirming that Federal candidates would be able to invoke Commission processes in support of their requests for time, and that a broadcaster's failure to provide Federal candidates any time at all would be plainly *un*reasonable.[5] At the same

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pp. 22-23), other political broadcasting provisions, applicable to all candidates, are either implemented or asserted in an "individualized" sense by candidates acting on behalf of *their* candidacies. *See, e.g., Citizens for Reagan*, 58 F.C.C.2d 925 (1976); *Rockefeller for Governor Campaign*, 59 F.C.C.2d 649 (B'cast Bur. 1976); *Lew Breyer*, 31 F.C.C.2d (B'cast Bur. 1968). Thus, a candidate exercising "equal opportunities" rights under Section 315(a) obviously is acting on behalf of his candidacy. It could be no other way. Similarly, Section 315(b), which defines certain broadcasting media rate limitations, speaks in terms of such rate provisions being applicable to *any* legally qualified candidate's campaign for *any* public office "in connection with *his* campaign for nomination for election, or election, to such office. . . ." 47 U.S.C. § 315(b) (emphasis added). Again, if Congress had intended to create a new, highly individualized right for federal candidates in Section 312(a)(7), it could easily have found words that were more specific and less general than "reasonable access" in connection with "his candidacy."

[5] As we noted in our opening brief (ABC Brief, p. 21 n.23), the conventional "willful or repeated" language of Section 312(a)(7) not only emphasizes the penalty aspect of the provision, but provides a further indication that Congress intended to place a broadcaster's license in jeopardy only if the denial of access was *complete*—i.e., "repeated" and consistent throughout a given campaign—not to provide an actionable remedy based on differences of days, weeks, or, as here, a single month, in a campaign that extends over many months (or longer).

time, by purposely incorporating a standard of reasonableness,[6] Congress sought to dispel any notion that Federal candidates were to be given a new right to command particular broadcast times or program segments based on their own individual campaign needs.

In sum, Respondents' interpretation of the statutory language unduly diminishes the conspicuous and repeated use of the term "reasonable." Fairly read, the statutory language confirms a right of reasonable broadcast access that specifically extends to all Federal candidates. Rather than introducing a radically different regulatory regime, Section 312(a)(7) essentially codifies and confirms prior agency practice premised upon a standard of reasonableness—a standard mirrored in other fundamental policies of the Act.[7]

B. The Dramatic New Standards Announced By The Commission For Implementing Section 312(a)(7) Also Conflict With Fundamental Principles Found Elsewhere In The Communications Act and Reflected In Long-Established Regulatory Policy

Essentially ignoring the foregoing literal terms of the statute, the Commission and court below have imposed new regulatory requirements that drastically alter basic precepts of the Communications Act and longstanding administrative practice. Respondents' efforts to portray these new requirements or standards as consistent with otherwise acknowledged principles of licensee discretion ultimately dissolve into a string of inconsistencies.

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[6] In an early response to this clear statutory standard, the Commission emphasized that in administering Section 312(a)(7) it would "apply the *same test of reasonableness* of the judgment of the licensee." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 538 (1972) (emphasis added).

[7] See ABC Brief, pp. 30-32.

For example, Respondents first claim that "[b]roadcasters enjoy complete discretion to withhold air time prior to the commencement of a campaign" (FCC Brief, p. 43), but then state that "once a campaign has commenced" broadcasters must "consider each request on an individualized basis." *Id.* In other words, "blanket" policies are permissible before the government declares the campaign to be in "full swing," but not thereafter. Support for this distinction, however, is conspicuously absent. One must merely presume that (1) a government decision on when the campaign commences for purposes of political time sales is more reasonable than a like determination by broadcasters and (2) the precise status of the campaign is somehow decisive on the question of when Section 312(a)(7) obligations attach. Both presumptions are patently unconvincing and unacceptable. Certainly nothing in the record of this case supports the view that the government is more expert or more impartial in judging when a campaign has commenced for Section 312(a)(7) purposes; and, despite repeated declarations that it is so, neither the language of the Act nor any pertinent legislative history even hints that Section 312(a)(7) obligations must begin upon some independent *ad hoc* determination of when a campaign begins.[8]

In a further inconsistency, Respondents have repeatedly chosen to characterize as, and draw pejorative implications from, "blanket" or "across-the-board" policies, which are no more than efforts of broadcasters to fashion seemingly reasonable and evenhanded approaches to candidate requests for air time. Thus, under their formula-

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[8] Indeed, in the only situation that bears any relevance—i.e., the contemporaneously enacted restriction on political rates to minimize the cost and, we submit, the length of broadcast campaigning—Congress chose to establish arbitrarily separate and clearly defined 60-day (for general elections) and 45-day (for primary elections) periods of time. See 47 U.S.C. § 315(b).

tion, any broadcaster determination to commence the sale of political time with a view toward evenhanded treatment of *all* candidates would be totally impermissible.[9] Rather, the *only* type of broadcaster determination possessing any prospect of being considered reasonable under the decision below would be one specifically tailored to the expressed campaign objectives of individual candidates.

If licensee discretion and the concept of reasonableness mean anything, they must permit the sort of four week difference from President Carter's demand of early December 1979 and ABC's offer, and subsequent sale, of early January 1980. Yet, under the reasoning advanced by Respondents, a failure to afford time even on a particular day—if that day had been requested by an individual candidate and urged as essential to his campaign tactics—could be construed as a "blanket" policy against sales on that day. In the end, therefore, Respondents' persistent characterization of ABC's determination to begin political sales in January 1980 rather than December 1979 as a "preconceived" blanket policy (FCC Brief, p. 44) is nothing more than a barely camouflaged denunciation of licensee discretion.

In a separate defense of the decision below, Respondents also suggest that the Commission's decision "narrows" the coverage of Section 312(a)(7) by "minimiz-

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[9] If there were any doubt on this question, the Respondents' brief is completely dispositive—declaring rather emphatically that any "uniform" or "evenhanded" broadcaster policy towards all candidates for the same office would be flatly inconsistent with Section 312(a)(7). FCC Brief, pp. 50-51. Unquestionably, this position differs sharply from previous Commission policy long considered appropriate under the public interest standard. *See, e.g., Humphrey for President Campaign*, 34 F.C.C.2d 471 (1972); *Rosenbush Advertising Agency, Inc.*, 31 F.C.C.2d 782 (1971). It also conflicts with a fundamental policy, long part of Section 315 of the Communications Act, that *requires* equal treatment among candidates.

ing the necessity for governmental intervention." FCC Brief, p. 47 (footnote omitted). On the contrary, by arrogating to itself the exclusive power to decide when the sale of time to candidates should begin, the Commission has not only developed a "standard" that is inconsistent with basic policies of Act, but one that thrusts the agency into the highly unique position of either favoring or disfavoring candidates who may be especially affected by determinations of when the broadcast campaign begins.

Finally, the suggestion that such standards are "largely self-executing" (FCC Brief, p. 68) is simply specious. In the present era of extended, nearly perpetual Presidential campaigns, certainly different assessments of when the campaign has "commenced" or is in "full swing" are possible—if not inevitable. Yet, under the standards adopted in this case, the only determination that counts is the government's own "objective" assessment.

Similarly, what is self-executing about ultimate judgments that make the difference between reasonable and unreasonable depend upon only a few weeks in campaigns that extend beyond a year? Suggestions first advanced by the court below (629 F.2d at 20, Pet. App. 37a), and more recent assurances by the Respondents (FCC Brief, p. 43), that broadcaster counter-offers of time will minimize government intrusiveness and add exactness, are belied by the realities of this case. Thus, while CBS "counter-offered" with smaller segments of programming and ABC "counter-offered" with a period during the first week of January (instead of the first week of December), the "dispute" was resolved by the government's declaration that such offers constituted unreasonable "blanket" policies.

The suggestion that the Commission's interpretation of Section 312(a)(7) can be administered in a mechanical

fashion is, therefore, ludicrous. Instead of being self-executing, as Respondents claim, the standards almost encourage candidates seeking media advantages in the guise of individualized treatment to turn to the Commission for *ad hoc* rulings on whether the campaign has commenced, whether individual candidate needs have been properly assessed, and whether any "counter-offer" by the broadcaster was sufficiently responsive.

While Respondents strive mightily to find a dramatically new, additional obligation arising out of Section 312 (a) (7), they never satisfactorily address the problems created by the new standards that purport to implement the claimed obligation. As we have shown, and wholly apart from what conclusions are reached about the literal language of the statute and its legislative history, in practical effect, the decision below poses a grave threat to reasoned decisionmaking. Instead of determining political access on the basis of overall reasonableness, as called for by the statutory language and the broad history that surrounds this provision and the political broadcasting and related provisions of the Act, the Commission has devised implementing standards that can only breed confusion and arbitrariness—a conclusion that is merely confirmed anew by the Respondents' brief.[10]

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[10] In this connection, we believe the Court should be advised that on December 11, 1980—more than a year after the complaint in this case but only a month following the general election—the Assistant Secretary for Communications and Information of the Department of Commerce, acting for the National Telecommunications and Information Administration (NTIA), filed a petition with the FCC requesting the initiation of a notice of inquiry to consider an approach to implementing Section 312(a) (7) that would differ dramatically from the approach and interpretation formulated by the Commission in this case. In essence, the approach now recommended by NTIA calls for the Commission to abandon complaint-by-complaint determinations under Section 312(a) (7) and, instead, to examine the question of compliance with Section 312(a) (7) "only upon an overall basis, either at renewal or revocation." NTIA "Petition to Issue Notice of Inquiry," Dec. 11,

II. RESPONDENTS HAVE GLOSSED OVER THE POLITICALLY INTRUSIVE NATURE OF THE DECISION BELOW

As we emphasized in our main brief, one of the more disquieting aspects of the decision in this case is the threat it poses for governmental involvement in the partisan political process. Thus, under the standards crafted by the Commission and approved by the court below, not only is the Commission to make "legal" determinations concerning the commencement date of federal campaigns, with attendant political access consequences, but it is also to sit in judgment on whether broadcast stations have been sufficiently responsive to each candidate's expression of need for the time sought.

Respondents' brief attempts to gloss over the politically intrusive nature of these standards by suggesting that the ruling below enhances political discussion. In our

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1980, p. 1. Apart from the merits of this proposal, it is significant that NTIA urges this particular course, in part, *because* a case-by-case application of the standards developed in this (*Carter-Mondale*) case will thrust the Commission "deep in a quagmire" (*id.* at 10) of highly subjective decisionmaking in a particularly "sensitive political area." *Id.* at 11. Raising a number of rhetorical questions going to the Commission's ability to review licensee judgments concerning such matters as the validity of specific counter-offers in any rational manner, the NTIA petition concludes: "Since everything turns on the facts of each case—not only the varying jumble of other factors but also the candidate's assertion of need and evaluation of that first by the broadcaster which has discretion to decide otherwise and then by the Commission—the process is, we believe, a necessarily subjective one, in that the parties can only know if they have acted reasonably when the agency issues its declaration." *Id.* at 11-12 (citation omitted). In NTIA's view, although Section 312(a)(7) was designed to impose a general obligation to afford access to federal candidates, Congress still intended that broadcasters be "broadly accountable" under the provision (rather than accountable to each individual candidate demand), "so as to avoid interference with day-to-day editorial decisions." *Id.* at 4.

view, this is a diversionary argument that, at bottom, simply fails to come to grips with the major First Amendment dangers posed by the standards and approach sanctioned by the Commission's decision.

We do not question that Congress and the Commission have long sought to encourage the availability of the broadcast media to political candidates. However, this is not the issue before this Court. The issue is whether the standards the Commission has adopted in this particular case—standards that, unless overturned, will govern all future Section 312(a)(7) cases—have unduly intruded upon broadcaster discretion and into the partisan political process.

Respondents have incorrectly suggested that the position of ABC and the other network companies is that First Amendment principles were violated in this case solely because broadcasters were not given virtually total discretion. FCC Brief, pp. 62-63. That simply is not the case—as ABC's opening brief makes clear. We do not claim that broadcasters should have total discretion in this area any more than we would concede that the government should have total discretion in this area. Respondents' attempt to cast our position in that form is merely an effort to detour the Court from the more sensitive issue presented.

Permitting broadcasters to exercise discretion as to when political sales should begin in given political campaigns is not inconsistent with preexisting law. *See, e.g., Antony R. Martin-Trigona*, 66 F.C.C.2d 968, 969 (B'cast Bur.), *review denied*, 67 F.C.C.2d 33 (1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978); *Hon. Dan Walker*, 57 F.C.C.2d 799 (1975). Nor is it inconsistent with the precise language of Section 312(a)(7), which, as we have noted, actually contemplates such discretion by incorporating a standard of overall reasonableness. The con-

cept of pegging broadcast political sales to an FCC-perceived commencement of the election campaign is, in fact, solely a creation of the Commission. What the Commission has done in this case is to attempt to transform a previous editorial decision on when to begin political sales into an "objective" FCC judgment. The semantic changes do not alter the essential fact—i.e., the statute does not address this specific matter and the Commission has usurped a broadcaster editorial decision.

Remarkably, Respondents now claim that these standards affirmatively operate to minimize government intrusiveness. In fact, the government's brief represents yet another manifestation of the Commission's persistent failure to appreciate the inherently sensitive political nature of the decisionmaking process required by the standards in this case. To characterize these standards as enhancing First Amendment values, or designed to avoid governmental intrusiveness, or self-executing, serves only to confirm the Commission's lack of sensitivity on this issue. Indeed, the risks of non-neutral decisionmaking—always present when a government agency is asked to arbitrate matters affecting competing political candidates—are substantially heightened by a system, as here, that places so much emphasis on individual candidate needs and then makes the government the ultimate arbiter of the sufficiency of those needs, and the sole judge of when such needs must first be honored.

In sum, the standards adopted by the Commission and upheld by the Court of Appeals exalt individual candidate needs over broadcast discretion and effectively preclude broadcasters from responding to candidate requests in an evenhanded manner. In practice, these standards will heighten the degree of governmental surveillance in an area that demands both the appearance and the fact of neutrality.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
McKENNA, WILKINSON
& KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Counsel for Petitioner American Broadcasting Companies, Inc.

Of Counsel:

EVERETT H. ERLICK
ROBERT J. KAUFMAN
AMERICAN BROADCASTING
COMPANIES, INC.
1330 Avenue of the Americas
New York, NY 10019

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